Predictably, several commenters urge the Commission to interpret competitors' access rights excessively. For example, AT&T requests that the FCC define the term "rights-of-way" to include "not only easements across land, but also entrance facilities, telephone closets or equipment rooms (e.g., within commercial buildings or multi-unit dwellings); cable vaults, controlled environment vaults, manholes, or any other remote terminal (to the extent those are not located in central offices or other LEC structures covered by the collocation regulations under Section 251(c)(6)); risers; and any other pathway (or appurtenance thereto) owned or controlled by a LEC."[67] MFS makes a similar request, but does not even exclude LEC structures covered by Section 251(c)(6).[68]

AT&T, MCI, and others are distorting and expanding the meaning of the term "rights-of-way." "A right-of-way is most typically defined as the right of passage over another person's land."[69] Applying this construction is particularly important because

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[67] AT&T at 15; *see also* ACSI at 7; ALTS at 7; MCI at 22-23; Comments of NEXTLINK Communications at 5 ("NEXTLINK").

[68] MFS at 9. MFS's interpretation would allow it access to LEC structures generally, including "premises" governed by the collocation provisions of Section 251(c)(6) without meeting the limitations of that Section. AT&T's express goal is to use Section 251(b)(4) to help it gain access to all ILEC structures not covered by Section 251(c)(6). AT&T at 15.

[69] *Wilderness Society v. Morton*, 479 F.2d 842, 853 (D.C. Circuit), *cert. denied*, 411 U.S. 917 (1973).

requiring a right-of-way easement is a taking of property.[70] A statute must be construed narrowly to avoid a taking that is not expressly authorized by Congress.[71] Accordingly, the access to LECs' rights-of-way provided in Section 251(b)(4) must be read to refer only to the LECs' easements and other rights of passage over the land belonging to third parties.[72] The Commission should reject the proposals of AT&T and MFS to broaden this term to include access to the various additional properties they name, including properties of both third parties and LECs.

Those proposed rules that would require access to assets that a LEC does not own are simply irrational.[73] Neither we nor other LECs can supersede the property rights of owners by permitting access to third parties. If a competitor seeks access, it should negotiate an authorization with the property owner. We wish to reiterate that any FCC guidelines should make clear that no party can be compelled to give that which the law does not permit [74]

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[70] *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 and n.1 (1987).

[71] *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1445-446 (D.C. Circuit 1994).

[72] *Wilderness Society*, 479 F.2d at 854.

[73] *Cf.* Ameritech at 38; BellSouth at 17; NYNEX at 12; PTG at 23; Rural Telephone at 13; UTC at 7.

[74] *See* PTG at 23.

In addition, Section 251 of the Act is very clear that it applies to the "poles, ducts, conduits, and rights-of-way" of LECs.[75] This docket should deal only with these specified LEC-owned properties. While access to these same properties owned by non-LECs, and to other properties whether or not owned by LECs, is also important, expanding this proceeding to include all properties is in conflict with the intent of Section 251. A subsequent comprehensive rulemaking may be needed to address these broader issues. However, the expansion of this docket to include issues such as private property rights is not only inappropriate, but also threatens to needlessly delay this proceeding.

Finally, we urge the Commission to ensure that other local carriers are required to provide reciprocal access. In its comments, AT&T suggests that "Congress explicitly established an asymmetrical set of duties in Section 224(f) -- ILECs must provide nondiscriminatory access to ALECs or other telecommunications carriers, but not vice versa."[76] AT&T is in error. Section 251(b)(4) applies to all LECs, not just incumbents. Moreover, unreasonably excluding carriers such as AT&T, which has substantial support facilities of its own, would be illogical and unfair. Thus, the failure of any LEC to provide reciprocal access should constitute unlawful discrimination in violation of the Act.[77]

[75] *See* Section 251(b)(4).

[76] AT&T at 12.

[77] PTG at 23.

Denial of Access (*Notice*, para. 223). Allowing only electric utilities to deny access based on safety, reliability, and engineering purposes is both discriminatory and dangerous.[78] Electric utilities are not the only entities that encounter safety and reliability issues that affect capacity. We concur with Ameritech's statement that "[i]t would be irresponsible to interpret the 1996 Act as leaving states and carriers powerless to protect the safety of the public and their employees and to maintain the reliability of their networks."[79] There is no legitimate reason to single out an industry segment for preferential treatment and exclude others that face the same limitations.

Several commenters point out the existence of established industry standards (*e.g.*, National Electric Safety Code) and state codes,[80] which already establish safety requirements that apply to many support facilities.[81] Given the existence of such accepted standards, the FCC need not adopt new rules to govern safety. The Commission should allow LECs, along with electric utilities, to rely on the existing requirements for safety and reliability in determining whether available capacity exists.

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[78] *See, e.g.*, Ameritech at 37; Bell Atlantic at 14; BellSouth at 15; GTE at 24-25.

[79] Ameritech at 37.

[80] For example, the Safety Division of the CPUC has established safety standards with which electric and communications utilities must comply. *See, e.g.*, *Rules for Construction of Underground Electric Supply and Communication Systems*, General Order No. 128.

[81] *See, e.g.*, Comments of American Electric Power Service Corp., et al. at 22 ("American Electric"); Ameritech at 38; Bell Atlantic at 14; Comments of Continental Cablevision, Inc. at 17 ("Continental"); GTE at 25; Kansas City Power at 2-3; Time Warner at 14.

A few parties urge the FCC to require LECs to reconfigure their facilities when space is not readily available.[82] For example, MFS proposes that the "Commission's rules should provide that access may not be refused due to insufficient capacity if it is possible to rearrange the existing facilities . . . to accommodate the new user."[83] Although we do not object to such a requirement, we strongly support requiring the requesting entrant to bear the full cost of any reconfiguration. MCI's proposal to require all carriers to bear a portion of the rearrangement costs based on TSLRIC[84] is unreasonable and unfair. Even MFS correctly points out that Section 224(i) would require the new user to pay all costs associated with any such arrangement.[85] There is no valid reason why the requesting party should not bear the costs of a reconfiguration performed solely to accommodate that new entrant.

Modification of Facilities (*Notice*, para. 225). Many parties, including us, strongly advocate leaving issues of notice, cost sharing, and the right to modify a facility to the states. According to these commenters, rules governing notice of modifications are unnecessary. They have explained that modifications occur under a number of different circumstances, (*e.g.*, damage, deterioration, technological change,

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[82] *See, e.g.*, AT&T at 16; GST Telecom at 5; MFS at 10.

[83] MFS at 10.

[84] *See* MCI at 23-24.

[85] *See* MFS at 10 n.8.

public works projects, growth demand),[86] thereby making uniform rules inappropriate. Moreover, different parties may desire different types and timing of notification. Because of such divergent needs, the Commission should allow private parties to resolve the notice issues through agreement.[87]

The most contentious issue concerning facilities modifications is cost sharing. MCI recommends using total service long run incremental cost ("TSLRIC") to determine compensation for an alteration.[88] This mechanism is unnecessarily complex, and mandating its use is inconsistent with reliance on private negotiations and state policies. Further, rates set at TSLRIC would not allow LECs to recover their full costs.[89] The solution that balances all interests and ensures fairness is simply to require attaching entities to bear their proportionate share of the costs of the modification as determined by agreements subject to state review.

Other Issues. According to AT&T, the Commission should require utilities to provide their "cable plats and conduit prints showing the nature and location of their

[86] Ameritech at 39.

[87] GTE at 27-28; Frontier at 7; PTG at 21; USTA at 10.

[88] MCI at 24-25.

[89] For a complete discussion of the economic and legal inadequacies of TSLRIC as a pricing mechanism, see Comments of PTG filed on May 16, 1996 in this proceeding at 69-72.

poles, cables, and conduits," upon request.[90] Security considerations render such a blanket requirement untenable. However, on a case-by-case basis, we will reveal such information to a legitimate party making a *bona fide* request.

We also oppose the establishment of new complaint mechanisms and federal court remedies as proposed by certain commenters. For example, Teleport would permit an applicant to select federal jurisdiction for enforcement and appeal of any matter related to pole attachments as well as seek injunctive relief in federal court.[91] An effective complaint process is already in place. In California, when parties fail to agree upon the rates, terms, and conditions of access, the CPUC is authorized to determine whether access is required and what compensation, terms, and conditions are reasonable under the circumstances.[92] If a state chooses not to regulate in this area, the FCC can step in as necessary at that time.

In addition, there is no need to shift the burden of proof with respect to claims of unreasonable access denials, as recommended by parties such as AT&T and MCI.[93] Traditional enforcement mechanisms are fully adequate to protect all parties' rights.

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[90] AT&T at 19.

[91] Teleport at 9.

[92] *See* Cal. Pub. Util. Code Section 767 (West 1975).

[93] *See, e.g.*, AT&T at 17; MCI at 23.

IV. ALL PARTIES URGE THE COMMISSION TO MOVE FORWARD PROMPTLY TO IMPLEMENT THE DIRECTIVES SET FORTH IN THE *NANP ORDER* (*Notice*, para. 250-259)

The commenting parties unanimously agree that to comply fully with the Act's requirement to designate an impartial administrator to make numbers available on an equitable basis,[94] the Commission must proceed to implement the mandates established in the *North American Numbering Plan Order ("NANP Order")*.[95] There is broad consensus that prompt action to name the members of the North American Numbering Council ("NANC") and select the administrator is critical to future administration of the NANP.[96]

Until that time, commenters generally agree with the Commission's proposals for interim administration. (*See Notice*, para. 258) MFS supports California's plan to share code assignment functions between Pacific Bell and the CPUC until a permanent administrator is named.[97] The FCC should identify this arrangement as a "safe harbor" under the Act as well It is fully consistent with the general intent to permit the LECs, along with Bellcore and the states, to continue performing each of their

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[94] *See* Section 251(e)(1).

[95] *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588 (1995) ("*NANP Order*") (*recon. pending*).

[96] *See, e.g.*, ALTS at 8; Ameritech at 22-23; AT&T at 11; Bell Atlantic at 9; BellSouth at 19; Frontier at 5; GTE at 30; MCI at 10; MFS at 7; NYNEX at 18; PTG at 24; SBC at 9; Sprint at 12-13; USTA at 14-15.

[97] MFS at 9; *see also* PTG at 25.

respective functions related to number administration until the transfer to the new entity.

Area Code Overlays (*Notice*, para. 255-257). Several commenters raise the issue of area code overlays and recommend a general prohibition on this relief mechanism.[98] For example, Cox Communications, Inc. ("Cox") urges that overlays be deemed a "last resort" in area code relief planning.[99] MCI advocates expanding the *Ameritech Order* [100] to state specifically that: (1) area code splits are preferable to overlays; (2) an overlay relief plan can only be implemented when it is the only practical alternative; and (3) an overlay mechanism that is adopted must have mandatory 10-digit dialing and assign all remaining NXXs in the existing Numbering Plan Area ("NPA") to CLECs.[101] MFS proposes that an overlay be permitted only if every LEC authorized to operate within the NPA can receive at least one NXX code for each of its exchange areas from the original area code.[102] In addition, Teleport

[98] *See, e.g.*, Cox at 3-6; MFS at 8; NCTA at 9-10; Teleport at 7; Time Warner at 20.

[99] Cox at 3.

[100] *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, 10 FCC Rcd 4596 (1995) ("*Ameritech Order*") (*recon. pending*).

[101] MCI at 11-14; *see also* MFS at 8.

[102] MFS at 8.

suggests that Pacific Bell is violating state policies by proposing overlays for particular NPAs in California.[103] These suggestions are unfounded.

Commenters' concerns that CLECs will be disadvantaged by overlays unless the FCC imposes additional restrictions on their use are unwarranted. In California, Pacific Bell has already assigned to CLECs NXX codes in the next two NPAs subject to possible splits (415 and 916). Thus, Pacific Bell is fully complying with the nondiscriminatory access to numbers as required by the Act, the *Ameritech Order*, and state requirements. Moreover, California has established other safeguards to ensure the fairness of area code relief plans. For example, whenever a telephone corporation proposes to establish a new area code in California, it must: (1) provide notice to all affected subscribers and the CPUC; and (2) conduct public meetings to give affected subscribers an opportunity to discuss the potential impact and any mitigating measures.[104] California's policies demonstrate that the issue of area code overlays remains best addressed at the state level.

Further, Teleport's efforts to mischaracterize events in California is a gross distortion of the facts and a misinterpretation of the law. Neither the Act, the *Ameritech Order*, nor California law precludes the use of overlays. While it is true that the CPUC recently rejected overlay plans for the 310 NPA, it did not ban the use

[103] *See* Teleport at 5-6 ("Pacific Bell has essentially ignored the 310 Order and simply redirected its efforts to implement overlay plans in nearby area codes.")

[104] Cal. Pub. Util. Code Section 7930 (West 1994); *see also id.* at Section 7931.

of overlays entirely.[105] To the contrary, the CPUC expressly stated that it "remained intrigued by the overlay plan, and would like to consider it in the future."[106] Further, the CPUC announced that it might "adopt overlays as the most appropriate policy to address numbering issues in California."[107]

Teleport's mischaracterization of the CPUC's holding simply ignores the fact that the CPUC recognizes that overlays may be appropriate in some cases. Indeed, in a recent ruling regarding area code relief, an Administrative Law Judge indicated that the "statewide policy needs to articulate under what conditions overlays may be considered in individual NPA relief plans."[108] The ALJ concluded that a determination of whether to implement a split or an overlay for a specific NPA would be made on a case-by-case basis.[109]

We submit that overlays are not anticompetitive. In fact, area code overlays have tremendous value and, in major metropolitan areas, are preferable to geographic splits. First, and most importantly, overlays do not require customers to change their numbers, thereby saving both residential and business customers tremendous

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[105] *Airtouch Communications and MCI Telecommunications Corp. v. Pacific Bell* (August 11, 1995) Cal. P.U.C. Dec. No. 95-08-052 ("*310 Order*").

[106] *310 Order* at 50.

[107] *Id.* at 60.

[108] *Administrative Law Judge Ruling on a Procedural Schedule for Developing a Statewide Plan for Area Code Relief Measures* (April 30, 1996) at 3 ("*ALJ Ruling*").

[109] *Id.* at 11.

inconvenience and costs. Second, overlays maintain existing communities of interest since the geographical boundaries served by the old area code do not change. Third, overlays do not result in smaller and smaller geographic areas.[110] Fourth, an overlay takes less time to implement than a split. These advantages are significant for states such as California, which face number exhaustion at an accelerated pace. Indeed, it is expected that the number of area codes in California will climb from thirteen to twenty-six by the year 2001.

The overwhelming majority of parties, including AT&T, endorse leaving authority over area code relief plans to the states.[111] They are already charged with the responsibility of implementing the FCC's broad numbering principles to ensure that numbering resources are available on an efficient and timely basis and are best attuned to determine the needs of their citizens. There is no reason to change their allocation of responsibility at this time. It is self-evident that California's reliance on a public process that involves open public meetings and customer surveys[112] is preferable to arbitrary national rules. Thus, as even MFS agrees, the FCC should allow the states to

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[110] This occurrence is known as "the shrinking NPA syndrome." The existing 213 NPA in California is nine square miles. A geographic split would create an NPA of approximately 5 square miles, which is excessively small.

[111] *See, e.g.*, Ameritech at 24; AT&T at 11; Bell Atlantic at 9; BellSouth at 20; Frontier at 5; Pennsylvania PUC at 5.

[112] The recent ALJ ruling on area code relief in California calls for a statewide survey of customer preferences for geographic splits or overlays. *ALJ Ruling* at 7.

deal with unique local factors such as population density, costs, and customer choice that are relevant to determining what form of NPA relief is appropriate.[113]

Cost Recovery (*Notice*, para. 259). There was little detailed comment on the mechanisms for recovery of the costs of number administration. The commenters generally agree that no one industry segment should be disadvantaged.[114] MCI, however, recommends the reduction or elimination of the costs associated with implementing interim number portability.[115] This suggestion is contrary to the Act's requirement that all telecommunications carriers bear the cost of establishing a numbering administration.[116] Interim number portability is an essential element in the process of achieving fully equitable number administration. All parties that benefit from this process should contribute to full cost recovery.

[113] MFS at 7-8.

[114] *See, e.g.*, GTE at 31; PTG at 25-26.

[115] MCI at 14.

[116] *See* Section 251(e)(2).

V. CONCLUSION

The record strongly supports our demonstration that:

- The Commission should establish FCC guidelines in the form of "safe harbors" or "preferred outcomes" to foster competition in the local exchange market. (*See* Proposed FCC Rules and Implementing Guidelines for Section 251 Interconnection Requirements, Reply Comments of Pacific Telesis Group, Appendix A, filed May 30, 1996).

- The Commission should apply the existing network information notice and disclosure requirements established in the *Computer Inquiry* and contained in Part 68 to all LECS. The scope of covered information and the time frames for disclosure established by those rules are adequate, and there is no need for additional formal requirements such as FCC filings or complaint procedures.

- Dialing parity should be defined as equal-digit dialing for all calls, and full 2-PIC presubscription should be identified as a "safe harbor." Presubscription methodologies and cost recovery mechanisms should largely be left to the states. Existing regulations and the marketplace will ensure that operator services, directory assistance, and directory listings are available on a nondiscriminatory basis.

- Nondiscriminatory access to rights-of-way should largely be left to private negotiations, with state oversight, and does not require an owner to treat itself the same as other attaching parties. Detailed federal rules regarding denials of access, pricing, and notice of modifications are unnecessary and, in any event, may not be imposed to deny facilities owners' legitimate rights to the use of and compensation for their assets.

- The numbering regulations established in the *NANP Order* are adequate and should promptly be implemented. Application of the FCC's numbering principles should remain with the states, particularly in connection with the use of overlay area codes.

Accordingly, the Commission should endorse the above as sufficient to satisfy the Telecommunications Act's requirements.

Respectfully submitted,

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